The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo

The 'Regionalization' of International Criminal Justice in Context

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Abstract

In August 2015, Kosovo established the Specialist Chambers (SC) and the Specialist Prosecutor's Office (SPO) with the mandate of prosecuting international and transborder crimes committed during and after the 1998–1999 armed conflict. This article examines the founding instruments of the SC and the SPO, the influence of certain regional organizations in their creation and management, their organization, jurisdiction, legal nature and the function they exercise within the international legal system. The key question is whether the SC and the SPO may be included in existing categories of judicial entities established to deal with international criminal justice. The article concludes that they represent a regional variation of mixed criminal tribunals.

1. Introductory Remarks: A Problem of Legal Taxonomy

This article focuses on a number of legal problems raised by the establishment of the Specialist Chambers (SC) and the Specialist Prosecutor's Office (SPO) in Kosovo. These were created by law in August 2015 and are entrusted with bringing to trial those responsible for international crimes perpetrated in Kosovo during and after the armed conflict that broke out in the late 1990s.

This article explores the features of the SC and the SPO, and seeks to answer the question of whether they form a new category of judicial bodies acting in

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Journal of International Criminal Justice (2016), 1 of 20 doi:10.1093/jicj/mqv083

the field of international criminal justice or instead belong to a pre-existing category, namely national, international or mixed criminal tribunals.

These are not mere labelling queries for the purposes of scholarly classification. Several legal consequences flow from such a determination, such as, *inter alia*: the identification of the entity (a state, an international organization or the court itself) to which the judicial activity should be attributed for the purposes of international law; the legal regime governing the court's functioning; and the applicability or relevance of some specific rules of international law (e.g. those on the immunity of state officials pursuant to customary norms, or those on the relationship with the International Criminal Court (ICC)).

For reasons I have discussed elsewhere,[1] in tackling these issues one should focus, first, on the legal nature of the relevant judicial body — which can alternatively be domestic or international (Sections 6 and 7) — and, second, on the function such body exercises within the international legal order. Due to the gravity and nature of international crimes, these entities typically function to protect fundamental values of the international community as a whole. However, it is to be assessed whether such protection amounts to an 'enforcement' measure (i.e. exclusively aimed at implementing international criminal law); and/or a 'preventive' measure (because the establishment of the judicial body is meant to enable the territorial state to prosecute international crimes which may be committed in its territory or by its nationals in the future); or something else entirely (Section 8).

Furthermore, one should take into account the influence, interests and objectives of external actors (such as, in this case, the European Union (EU) and the Council of Europe (CoE)) in creating and managing the judicial entity at hand. This article contends that the SC and the SPO are just another step in the direction of a 'regionalization' of international criminal justice (Section 9).

However, in order to conceptualize the main normative features of the SC and the SPO, we must first recall the process that led to their establishment (Section 2), the role played by the said external actors in such establishment (Section 3), their organization and jurisdiction (Section 4). This survey will answer the question of whether the SC and the SPO — which cannot be considered as two separate entities, but a single judicial body — should be categorized as a mixed criminal tribunal (Section 5).

2. The Creation of the SC and the SPO

The SC and the SPO were created by Law No. 05/L-053 (hereinafter, 'the Law'), adopted on 3 August 2015 by the Assembly of the Republic of Kosovo, effective as of 15 September 2015.[2]

1 See E. Cimiotta, *I tribunali penali misti* (Cedam, 2009), at 36 *et seq.*, 331 *et seq.*, 457 *et seq.*

2 Law No. 05/L-053 of 3 August 2015, on the SC and the SPO (available online at www.kuvendikosoves.org, last visited 3 November 2015).

The Law came as the result of a long and arduous decision-making process, marked by a high level of EU involvement. It aims to ensure independent, fair, secure and efficient criminal proceedings in response to allegations of serious transborder and international crimes committed in Kosovo between 1 January 1998 and 31 December 2000.

On 3 August 2015, the Assembly also approved Constitutional Amendment No. 24, which added a new Article 162 to the Kosovo Constitution. The latter provides for the authority to create — as new judicial organs within the domestic judicial system — the SC and the SPO, and sets the legal framework for their organization, jurisdiction and functioning. According to Article 162(1), these aspects are regulated by Article 162 itself (paras 2–14)[3] and by the said Law.

Finally, on 15 April 2015, the Constitutional Court — in reviewing the constitutional compatibility of the proposed amendment, during its prior assessment pursuant to Articles 113(9) and 144(3) Kosovo Constitution — had given leeway to Constitutional Amendment No. 24 by stating that it would not undermine any of the fundamental rights and freedoms guaranteed by the Constitution.[4]

3. The Contribution of the CoE and the EU to the Creation of the SC and the SPO

The steps which led to the creation of the SC and the SPO involved with separate functions and roles two regional organizations, namely the CoE and the EU.

First, the plan to set up a special court in Kosovo grew from the allegations contained in the Report 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo' released on 12 December 2010 by the Special

3 In particular, the Amendment affords procedural guarantees for those who are subject to the jurisdiction of the SC and the SPO, requiring to uphold the protection enshrined within Chapter II of the Constitution (Art. 162(2)). It grants to the SC and the SPO full legal personality and all the necessary powers for their operation, judicial cooperation, assistance, witness protection, security, detention and the service of sentence outside of Kosovo. Before entering into any international treaty with a third state relating to judicial cooperation, which would otherwise require ratification under Art. 18 Kosovo Constitution, the SC are required to seek the approval of the Kosovo government (Art. 162(4)(5)). Moreover, according to the Amendment the SC and the SPO may have a seat in Kosovo and a seat outside of Kosovo. Consistent with international law, any persons accused of crimes before the SC may be detained and transferred to the SC sitting outside of Kosovo (Art. 162(7)(8)). Finally, the duration of the SC and the SPO is set for a period of five years, unless notification of completion of the mandate occurs earlier (Art. 162(13)(14)).

4 Constitutional Court of the Republic of Kosovo, judgment of 15 April 2015, Case No. K026/15 (available online at www.gjk-ks.org, last visited 3 November 2015) (hereinafter: 'Constitutional Court Judgment').

Rapporteur for the CoE's Committee on Legal Affairs and Human Rights (hereinafter: 'Marty Report').[5]

The Report was subsequently endorsed by the CoE's Parliamentary Assembly. In its Report of 7 January 2011 (hereinafter: 'CoE Report'), the Assembly outlined a number of specific allegations concerning serious crimes (such as organized crime, illegal detention, inhuman treatment and illicit trafficking in human organs) perpetrated during and in the aftermath of the conflict, and recommended that Kosovo investigate and adjudicate them.[6] It stressed the need for an absolutely uncompromising fight against impunity,[7] and urged the Kosovo administration to cooperate unconditionally with the EU Rule of Law Mission in Kosovo (EULEX)[8] and with the Serbian authorities within the procedural framework intended to address those crimes. In particular, it recommended that Kosovo start a serious and independent investigation into the concrete and specific allegations of organ trafficking and secret detention centres, where inhuman treatment was purportedly inflicted by Kosovo Liberation Army (KLA) militias on prisoners of Serbian and Albanian origin.[9] It also recommended that all CoE Member States cooperate judicially to ongoing and future war crimes investigations upon request of the competent EULEX and Serbian authorities.[10]

The CoE thus launched the process for the creation of the SC and the SPO and for the judicial assistance by its Member States. Since 2011, the said allegations have been investigated by the EULEX Special Investigative Task Force (SITF) of the Republic of Kosovo's Special Prosecution Office.

Then, it was the EU's turn to intervene in the process. By establishing the SC and the SPO, Kosovo not only followed the recommendations of the CoE Report,[11] but also complied with the obligations stemming from the international agreement it reached with the EU through an exchange of letters. The agreement was ratified by Law No. 04/L-274 of 23 April 2014 and is incorporated in this Law by reference in its Article 2.[12] On 14 April 2014 the President of the Republic of Kosovo addressed a letter to the EU High Representative for Foreign Affairs and Security Policy, demanding to end EULEX mandate on 15 June 2016. Most importantly, the letter invited the EU to assist Kosovo in setting up and operating a judicial body — to be created within the Kosovo judicial system — to investigate, prosecute and adjudicate allegations originating from SITF's work.[13] The letter suggested the creation of

5 Available online at http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf (last visited 3 November 2015).

6 Council of Europe, Parliamentary Assembly, Report Doc. 12462, 7 January 2011 (available online at www.assembly.coe.int, last visited 3 November 2015).

7 *Ibid.*, § 14.

8 On EULEX, see *infra*, Section 9.

9 CoE Report, *supra* note 6, §§ 19.5.1–19.5.3.

10 *Ibid.*, § 19.6.

11 To which both the Constitutional Amendment No. 24 (Art. 162(1)) and the Law (Art. 1) expressly refer.

12 Available online at www.kuvendikosoves.org (last visited 3 November 2015).

13 The texts of this and of the following letter are attached to the Law No. 04/L-274, *Ibid.*

new dedicated chambers covering all levels of the court system, which might operate abroad due to the proceedings' sensitivity and whose structure would be managed by EULEX foreign staff only. To this end, Kosovo sought to adopt appropriate legislation. The President further stressed that EULEX would be delegated all necessary powers, under Article 20 Kosovo Constitution, to operate the chambers and the prosecution office, including the appointment of judges (under Articles 65, 84, 108 and 114 Kosovo Constitution) and prosecutors (under Articles 84 and 110 Kosovo Constitution). Notwithstanding the scheduled end date for EULEX, she concluded, the mandate to operate the SC and the SPO would continue until such time as Kosovo is notified by the Council of the EU.

In her reply of 14 April 2014, the EU High Representative for Foreign Affairs and Security Policy accepted the invitation, confirming that the SITF's work and any related judicial proceedings would continue until such time as the Council of the EU notifies Kosovo that the investigation and the proceedings are terminated.

As a result, the EU adopted Council Decision 2014/685/CFSP of 29 September 2014, amending the Joint Action 2008/124/CFSP of 4 February 2008 on the creation of EULEX. It inserted a provision requiring EULEX to support relocated judicial proceedings and to prosecute and adjudicate criminal charges arising from the investigation of allegations contained in the Marty Report.[14]

The Law on the establishment of the SC and the SPO was adopted precisely to enable the international agreement between Kosovo and the EU (Article 1(2)). Hence, they are intended to work within the framework of Kosovo's legal and judicial system, but with a view to implementing obligations and recommendations stemming from regional intergovernmental organizations.

4. The Organization and Jurisdiction of the SC and the SPO: Reflecting Some Normative Features of Mixed Criminal Tribunals

The SC and SPO have the organization and jurisdiction of a special criminal court, what creates a problem with regard to their legal classification. In order to address this problem, the present article will compare them with other tribunals acting in the field of international criminal justice.

With respect to organizational considerations, pursuant to Articles 3 and 24 of the Law, dedicated Chambers are attached to each level of the Kosovar judicial system: the Basic Court of Pristina, the Court of Appeals, the Supreme Court and the Constitutional Court.[15]

14 Council Decision 2014/685/CFSP of 29 September 2014, amending the Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, *Official Journal of the European Union*, L 284/51, 30 September 2014.

15 In accordance with Art. 49 of the Law, the Specialist Chamber of the Constitutional Court shall be the final authority for the interpretation of the Constitution as it relates to the subject-matter

Their composition changes depending on the circumstances: they may sit in panels of three judges (with a reserve judge), but judges may act individually when required by the Law, e.g. when performing pre-trial functions (Article 25).

The judges shall only be physically present at the SC seat — at the request of the SC President — to exercise such functions which require them to be present. Where possible, and as determined by the President, judicial functions may be fulfilled remotely (Article 26(2)). This is essentially justified by security and/or financial concerns. However, it is unclear whether an entire trial could be conducted remotely, which would be a novelty in international criminal justice.

The judges' independence is ensured by Articles 27(1) and 31. They have the authority and responsibility to perform judicial functions for the proceedings to which they are assigned and remain in their post until what comes first between the end of a four-year term and the completion of the phase to which they are assigned (Article 30).

Article 26 establishes a roster of 'international judges' — i.e. with nationalities other than the Kosovar one — from which to assign judges to specific cases. In fact, Article 27 states that they must possess the qualifications required 'in their respective states' for appointment to the highest judicial offices,[16] and the letter of the President of Kosovo to the EU High Representative for Foreign Affairs and Security Policy refers to foreign staff only (Section 3). The appointment procedure is led by an 'independent selection panel' comprised of three 'international members', at least two of which shall be 'international judges with substantial international criminal experience' (Article 28). Following an assessment of the qualified candidates, the panel finalizes a list of those it recommends for a position as judge. The list is forwarded to the Head of the EU Common Security and Defence Policy Mission (HCSDP), who, understandably, will serve as the Head of EULEX as long as the mission exists. The HCSDP is in charge of appointing selected candidates as judges and placing them on the roster for the duration of the SC activities. Based on the selection panel's recommendations, the HCSDP also appoints the SC President and Vice-President (Article 32), who are responsible for the judicial administration.

jurisdiction and activity of the SC and the SPO. In accordance with Art. 113(7) Kosovo Constitution, individuals, including the accused and the victims, are entitled to make referrals to the Specialist Chamber of the Constitutional Court in relation to alleged violations by the SC or the SPO of their individual rights and freedoms guaranteed by the Constitution, provided that all legal remedies have been exhausted. In accordance with Art. 113(8) Kosovo Constitution, a pre-trial judge or a panel of the SC may refer questions of constitutional compatibility of a law to the Specialist Chamber of the Constitutional Court when the question arises in a judicial proceeding and the decision in the case depends on the compatibility of that law.

16 They shall have 'established competence in criminal law and procedure or relevant parts of international law and constitutional law as appropriate, with extensive judicial, prosecutorial or defence experience in international or domestic criminal proceedings' (Art. 27(1)). It means that at least some of them should have worked for an international or a mixed criminal tribunal.

The SPO (Article 35), which shall take over the mandate and personnel of the SITF, is an independent office for the investigation and prosecution of offences within the jurisdiction of the SC. It acts independently from the SC and other prosecution authorities in Kosovo. It cannot seek or receive instructions from any government or from any other source and is composed of the Specialist Prosecutor, other Prosecutors, police and such other qualified staff as it may be required. Pursuant to Article 35(6), upon the SPO's establishment the SITF Lead Prosecutor is appointed as the Specialist Prosecutor. If he or she leaves the post at any time, a replacement is appointed by the HCSDP after consideration of suitably qualified applicants (Article 35(7)). The Specialist Prosecutor serves for a four-year term. Prosecutors and other office holders are also appointed by the HCSDP, upon recommendation by the Specialist Prosecutor (Article 35(9)).

The Registry (Article 34) includes a Defence Office, a Victims Participation Office, a Witness Protection and Support Office, a Detention Management Unit and an Ombudsperson's Office. It is responsible for the administration and servicing of the SC and all necessary and affiliated functions. It is composed of a Registrar and other staff as required. The Registrar may issue any necessary instruction for the purpose of administration and is independent in the performance of his or her functions. The Registrar serves for a four-year term and is appointed by the HCSDP (Article 34(4)(5)).

Articles 6, 7, 8, and 9 define the subject-matter, temporal, territorial and personal jurisdiction of the SC, respectively. Subject-matter jurisdiction covers international crimes (crimes against humanity, Article 13; and war crimes, Article 14) related to the allegations contained in the CoE Report. It also covers specific offences under Kosovo Law (Article 15), and specific offences under the Kosovo Criminal Code of 2012, where they relate to official proceedings and officials of the SC. Temporal jurisdiction covers conducts that took place between 1 January 1998 and 31 December 2000. Territorial jurisdiction extends to crimes committed or commenced in the territory of Kosovo. Personal jurisdiction only includes natural people, specifically, nationals of Kosovo or of the then Federal Republic of Yugoslavia (FRY) or individuals who perpetrated crimes within the SC subject-matter jurisdiction against nationals of Kosovo or FRY, wherever those crimes were committed.

Hence, the SC's organization and jurisdiction — set out in the Law — are mixed. The latter concerns both domestic and international offences committed during an armed conflict with both internal and international features: on the one hand, the non-international armed conflict between the KLA and the Serbian government; on the other, the international armed conflict between a group of North Atlantic Treaty Organization (NATO) Member States and Serbia. Moreover, the SC and SPO are composed of foreign judges, prosecutors and personnel, appointed by an entity that is external to Kosovo's domestic authorities (the HCSDP), following an internationally driven selection process led by foreign nationals. However, they operate within the Kosovar judicial system.

Due to the coexistence of the mentioned elements, the SC and the SPO cannot be perceived either as fully domestic or fully international criminal

tribunals. Accordingly, the question arises whether they should be considered to be a mixed criminal tribunal. Therefore, we must understand what a mixed criminal tribunal is and then assess whether — and, eventually, to what extent — the SC and SPO can be included in this category.

5. Mixed Criminal Tribunals as a 'Functional' Category

In my view, mixed criminal tribunals (also known as hybrid or internationalized criminal tribunals) fall into a 'functional' rather than a 'normative' category.[17] It is the function they materially exercise within the international legal system to bring them together. In fact, their normative features (the fact that they are composed of local and foreign judges, prosecutors and personnel; and their authority to prosecute both national and international crimes under both national and international criminal law) are insufficient to warrant their inclusion in an independent category. The balance between local and foreign components is different in each mixed tribunal.

However, all mixed criminal tribunals are physically and (more importantly) legally based on a permanent basis in the areas in which the offences within their jurisdiction occurred.[18] This circumstance may prove convenient on the investigative and judicial front in the short run, as well as on the normative, institutional, and socio-political one in the long run. All such areas were placed under a United Nations (UN) provisional administration or UN peacebuilding operations: the UN was thus entrusted with exercising public functions *vis-à-vis* local societies. Moreover, mixed tribunals were established at the end of internal armed conflicts (thus, they were embedded in post-conflict scenarios, where the problem of state reconstruction arises) as a result of the interaction between the UN and local governments. This interaction allowed national governments to promote the needs and the expectations of aggrieved populations. Therefore, ideally such tribunals are meant to influence national reconciliation processes; they are an extension of UN post-conflict peacebuilding activities in the criminal and judicial sectors.[19]

17 See Cimiotta, *supra* note 1, at 458–550.

18 Except for single trials exceptionally and occasionally relocated abroad due to security concerns, as in the *Taylor* case before the Special Court for Sierra Leone. This trial was transferred from Freetown to The Hague. A solution, however, that pushed the Court away from the victims and could thus undermine the process of national reconciliation, namely: one the purposes of the Court. For a similar criticism, see P. Mcauliffe, 'Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals', 55 *Netherlands International Law Review* (2008) 365–393.

19 See also P.K. Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?', 20 *Criminal Law Forum* (2009) 53–95; L. Raub, 'Positioning Hybrid Tribunals in International Criminal Justice', 41 *NewYork University Journal of International Law and Politics* (2009) 1013–1053; C. Ragni, *I tribunali penali internazionalizzati. Fondamento, giurisdizione e diritto applicabile* (Giuffrè, 2012), at 25 *et seq.*, 33 *et seq.*; C. Romano, 'Mixed Criminal Tribunals', in R.

To summarize, mixed criminal tribunals form a category of their own for two reasons.[20] On the one hand, they are, as a formal matter, *internal* to their respective territorial states. Unlike international criminal tribunals (namely, the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)), their activity has legal effect primarily upon individuals (at the inter-individual level) rather than upon states (at the international level). Mixed criminal tribunals avail themselves of national law enforcement authorities to carry out judicial police action and collect evidence within the boundaries of the state in which they are located, which is also the state where the crimes were committed. In this respect they act, like every domestic tribunal, against individuals, who are thus under their authority. A tribunal's judicial activity can directly affect an individual's legal standing, without any state mediation, like any domestic public institutions. The legal effects of such activity are confined to the territorial state's national legal order, to whom the activity is formally referable. International criminal tribunals are different, as they are not technically 'territorially based', not even in the state in which they have their headquarters. They do not belong to any state and do not operate within any domestic judicial system. They act within the international legal order and under international law and, as such, their activity is not legally attributable to any state. Such activity is principally addressed to states, rather than individuals, at least as long as the tribunals do not have suspects in their custody. At that point individuals come within the tribunal's authority and their legal position is directly affected by the tribunal's activity, within its own legal order, until a judgment is issued. Pursuant to international criminal tribunals' statutes (and unlike provided in mixed criminal tribunals' statutes),[21] states are bound to cooperate in the investigation and prosecution of crimes under those international criminal tribunals' jurisdiction and to respect their decisions and judgments (e.g. on matters like *ne bis in idem* and enforcement of sentences). Since that they do not directly control any law enforcement authority, international criminal tribunals must rely on states to identify, apprehend and detain individuals, collect documents, compel attendance of witnesses and enforce sentences of imprisonment — even when the activity must be undertaken in the host state's territory. Taking into account that criminal proceedings can only start in presence of the accused, international criminal tribunals must wait until the relevant state executes a request for arrest and transfer (except of course in the event of voluntary surrender). From a normative perspective, international criminal tribunals' statutes and decisions are not directly binding on individuals before their first appearance in court and after final conviction

Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013).

20 See Cimiotta, *supra* note 1.

21 Mixed criminal tribunals may seek a third state's assistance only based on ad hoc international agreements, very much like states seek international cooperation in criminal matters between themselves.

or acquittal. During such time, individuals are not subject to the authority of the international criminal tribunals; rather, they remain subject to the jurisdiction of the relevant state, to which the tribunals' acts are addressed. Consequently, the legal standing of individuals is only indirectly affected by the international criminal tribunals' judicial activity, i.e. through state mediation. The legal effects of such activity are principally contained within the international legal order (and not within the national legal order of individual states), because they primarily affect states' legal positions.[22]

On the other hand, mixed criminal tribunals are expected to carry out a particular *function* within the international legal system; a function which aims at protecting fundamental values of the international community as a whole, both as a 'preventive' and as an 'enforcement' measure. This function is performed for the purposes of UN post-conflict peacebuilding activities. The establishment of a mixed tribunal does not only seek to implement international criminal law in view of restoring the legal order undermined by crimes (which is typically a function of international criminal tribunals), but, more significantly, it also introduces new structural and normative elements into the territorial state's institutional and legal systems. These elements include an increased judicial capacity concerning the investigation and prosecution of international crimes, and the incorporation of substantial and procedural international criminal rules into domestic law. In other words, the creation of a mixed criminal tribunal is intended to produce long-term effects on the territorial state, at both the normative and the institutional level, thus enabling it *pro futuro* to adjudicate international crimes on its own.

Based on the aforementioned parameters, mixed criminal tribunals include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the United Nations Interim Administration Mission in Kosovo (UNMIK)'s Regulation 64/2000 Panels and the Special Panels for Serious Crimes in East-Timor.[23] The said definition of mixed criminal tribunals excludes the Iraqi High Criminal Court, the War Crimes Chamber of Bosnia and Herzegovina, the Special Tribunal for Lebanon and the Extraordinary African Chambers in the Courts of Senegal (EAC), despite all of them having — to a certain extent — mixed organization and jurisdiction.[24] In fact, such tribunals have not been involved in UN peacebuilding processes, and do not aim at fostering national reconciliation in the states where the crimes were committed.

22 This is one of the main reasons why the legal nature of the Nuremberg International Military Tribunal was not international *stricto sensu*, but domestic. The Tribunal was a joint body of the Occupying Powers. It exercised the respective judicial powers of these states, since they gained full public authority over German territory following its *debellatio*. See B.V.A. Röling, 'The Law of War and the National Jurisdiction since 1945', 100 *Recueil des Cours de l'Académie de droit international de La Haye* (1960) 323–456, at 356; C. Tomuschat, 'International Courts and Tribunals', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland, 1995) 1108–1115, at 1109.

23 The relevant elements are too many and diverse to allow a detailed analysis to be carried out here. See, extensively, Cimiotta, *supra* note 1, at 339–409, 427–550.

24 *Ibid.*, at 551–567.

They fulfil a different function and have different goals. The Iraqi High Criminal Court was created by the Occupying Powers in Iraq, with no UN involvement, to prosecute (and convict) the leaders of the defeated Iraqi regime as quickly as possible.[25] The War Crimes Chamber of Bosnia and Herzegovina was a sort of 'extension' of the ICTY into the Bosnian judicial system and was created for the purposes of its 'completion strategy'.[26] The Special Tribunal for Lebanon was not established in a post-conflict scenario to prosecute those allegedly responsible for international crimes and was imposed upon (and not accepted by) Lebanon by the UN Security Council, acting under Chapter VII of the UN Charter.[27] The EAC were created by the African Union (AU) and the state having custody of the accused (again, without any UN involvement), with no participation by the territorial state and no long-term spillover effects in its legal and judicial system. The defendant was allegedly responsible for crimes committed during a conflict that had erupted in another country (Chad).[28] These tribunals do not belong to any general category; each of them is a single, specific exemplar of judicial body.

The SC and the SPO may now be examined in light of the mentioned parameters.

6. The Internal Legal Nature of the SC and the SPO

For reasons beyond the scope of this inquiry,[29] the principal criterion in identifying the legal nature of a criminal judicial body seems to be the nature of the legal order — domestic or international — where the effects of its activity primarily take place. These effects — in terms of legal obligations, coercive measures and police operations — may alternatively occur at the inter-individual level, within the domestic legal order (as in the case of national tribunals); or at the international level, within the international legal order (as in the case of international tribunals). It depends on the nature — domestic (individual) or international (state) — of the subject whose legal position is directly affected by the relevant judicial body (Section 5).

25 J. Alvarez, 'Trying Hussein: Between Hubris and Hegemony', 2 *Journal of International Criminal Justice* (*JICJ*) (2004) 319–329; M. Scharf, 'Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice', 2 *JICJ* (2004) 330–337; D. Zolo, 'The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?', 2 *JICJ* (2004) 313–318.

26 W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', 46 *Columbia Journal of Transnational Law* (2008) 279–351.

27 F. Mégret, 'A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice', 21 *Leiden Journal of International Law* (*LJIL*) (2008) 485–512; W. Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?' 21 *LJIL* (2008) 513–528.

28 E. Cimiotta, 'The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?' 13 *JICJ* (2015) 177–197.

29 See, more extensively, Cimiotta, *supra* note 1, at 47–122.

The legal consequences of the activity carried out by the SC and the SPO are meant to principally take place in Kosovo, at the inter-individual rather than at the international level, since their activity is confined to Kosovo's legal system. The relationship with persons under their jurisdiction, by means of local law enforcement authorities, seems to confirm this view. Where appropriate, the SC and the SPO can interact with individuals for the purposes of judicial police action and evidence collection. Their entitlement to engage in police operations directly impacts the individuals' juridical domain. Unlike international criminal tribunals, the SC and the SPO do not need to obtain the assistance of the local government to accomplish law enforcement activities within the territory where they are located. Rather, like any domestic criminal tribunal, they are institutionally linked to local police forces. Moreover, the SC and SPO's statute does not impose duties of assistance or cooperation upon third states. Thus, it would be inaccurate to contend that their activity produces legal effects upon states other than Kosovo, as if they were embedded in the international legal order and, consequently, were international in nature. Rather, the SC and the SPO belong to Kosovo, to which their activity is formally referable.[30] They are integrated into the existing structure of the justice system, operate within the existing domestic legal framework and act under Kosovo's sovereignty, as was held by the Constitutional Court in its judgment of April 2015.[31]

The Court found that the prospective establishment of the SC and the SPO conformed with Article 103(7) Kosovo Constitution. This provision authorizes the establishment of 'specialized courts', as long as is necessary and pursuant to law, namely 'court[s] with a specifically defined scope of jurisdiction, and which remain . . . within the existing framework of the judicial system of the Republic of Kosovo and operate . . . in compliance with its principles'.[32]

The SC and the SPO are established by a Kosovo law, which regulates their organization, powers and jurisdiction. It prevails over any other conflicting law or regulation in Kosovo (Article 3(4)) and provides an organic and comprehensive normative setting. Moreover, the SC and the SPO act in accordance with the Constitution and domestic law (Article 3(2)). The Rules of Procedure and Evidence for the conduct of proceedings before the SC shall be adopted by the judges, who shall be guided by the Kosovo Criminal Procedure Code, provided their consistency with the Law (Article 19).

30 Recently, a completely different approach was adopted, *ex multis*, by W. Schabas, 'International Criminal Courts', in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 205–224. He stresses that international criminal courts are identified by one or more of the following features: 'establishment by treaty or by resolution of an international organization, subject-matter jurisdiction over international crimes, and significant international representation among the judiciary and other judicial officers' (at 208). However, it seems rather problematic to apply this test to the SC and the SPO, as well as to other special criminal tribunals (such as the EAC, the Extraordinary Chambers in the Courts of Cambodia, the Iraqi High Criminal Court and the Special Panels for Serious Crimes in East-Timor).

31 Constitutional Court Judgment, *supra* note 4, §§ 46, 59, 68, 71.

32 *Ibid.*, § 43.

Specific provisions of the Law offer more hints to the SC and the SPO domestic nature. Article 53 — included in Chapter VII (Interaction with Kosovo Courts and Entities) — equates the SC and the SPO to all other Kosovo courts and prosecutors with regard to the relationship with law enforcement authorities.[33] Pursuant to Article 53(2), orders issued by the SC enjoy the same legal force and effect of orders issued by any other Kosovo judge. Again, Article 53(3) establishes that arrest warrants issued by the SC have the same force and effect as those issued by any other Kosovo judge.[34] This also applies to forfeiture of property, proceeds or assets, pursuant to Article 53(4)(5).[35]

This normative setting is further enriched by those provisions of the Law which regulate prosecutorial and judicial functions and powers.

The SPO can avail itself of police forces and other domestic law enforcement authorities, like any other Kosovar prosecutor. Pursuant to Article 35, the SPO has authority to investigate and prosecute crimes within the jurisdiction of the SC, with a wide array of related tasks and activities.[36] In carrying them out, the SPO will, as appropriate, be assisted by Kosovar public entities. The police embedded within the SPO have the authority to exercise the powers granted ordinarily to the Kosovo police, consistently with the policies and procedures set forth in the Law (Article 35(3)). Similar provisions are contained in Article 38, which governs investigations and the preparation of indictments.

Similar powers are attributed to the pre-trial judge, who has the authority to review indictments, to rule on preliminary motions (including challenges to the indictment and to jurisdiction), and issue any necessary order to ensure that the case is prepared properly and expeditiously for trial (Article 39).[37] These same powers are also granted to the trial panel, which is responsible

33 Art. 53(1) reads: 'all entities and persons in Kosovo shall co-operate with the Specialist Chambers and Specialist Prosecutor's Office and shall comply without undue delay with any request for assistance or an order or decision issued by Specialist Chambers or Specialist Prosecutor's Office'.

34 Art. 53(3) further reads: '[w]here such a warrant of arrest is executed, the arresting police officer shall transfer the person arrested into the custody of the Specialist Chambers'.

35 In fact, according to Art. 53(4)(5), '[p]roperty, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained in Kosovo as a result of its enforcement of a judgement of the Specialist Chambers shall be transferred to custody and control of the Specialist Chambers without delay'.

36 The following list is provided by Art. 35: 'requesting the presence of and questioning suspects, victims and witnesses, and if necessary summonsing these persons; collecting and examining information and evidence; conducting on-site investigations; seeking the co-operation of any State or inter-governmental, international or national organisation . . . , and entering into any arrangements or agreements as may be necessary in that regard; . . . ordering the arrest of a person during the investigative stage for a period of no more than forty eight (48) hours'.

37 Art. 39 reads: '[t]he Pre-Trial Judge may, at the request of the Specialist Prosecutor, issue such orders and warrants for the arrest and transfer of persons to the Specialist Chambers and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial . . . . . The Pre-Trial Judge may, where necessary, [issue] temporary freezing orders, temporary confiscation orders or other temporary measures'.

for the conduct of trial proceedings, thus ensuring that they are fair and expeditious (Article 40).[38]

Even the Registry can make use of domestic authorities for the performance of its mandate (Article 34). It can exercise the same powers as the Kosovo police under domestic legislation.[39]

The Law also regulates the detention by order of or on behalf of the SC or the SPO. Detention facilities are managed by the Registry (Article 41). Should the proceedings be partially or completely relocated to a host state under Article 3, the detention facilities would be placed in the vicinity. In this regard the Registrar, guided by the Kosovo Criminal Procedure Code, adopts the 'Rules on Detention, Complaints and Disciplinary Procedures for the Detention Facilities'.[40] Hence, the detention system is fully internal, even when detention actually takes place outside of Kosovo.

Furthermore, the SC and the SPO can call a witness if, likely, he or she may have information about a crime, the perpetrator or important circumstances relevant to the proceedings (Article 42). Any person present in Kosovo called as a witness has a duty to respond to the summons and testify, unless otherwise provided in either the Law or the Rules of Procedure and Evidence.[41] If requested by the SC, other Kosovar courts and officials are required to assist in the service or enforcement of witness summonses.

Finally, as said, the Law does not impose any duty of assistance or cooperation upon states or international organizations. Pursuant to Article 55 — included in Chapter VIII (Co-operation and Assistance with Other States, Organisations and Entities) — the SC and the SPO may request the assistance and cooperation from states other than Kosovo, international organizations, and other entities as necessary for the exercise of their functions. To this end, Article 4 allows the SC, the SPO and the Registry to enter into such arrangements as necessary or to utilize any mutual legal assistance agreements entered into by Kosovo.

38 Art. 40 reads: 'the Trial Panel may, as necessary: exercise any functions or powers of the Pre-Trial Judge referred to in Article 39; . . . require the attendance and testimony of witnesses and production of documents and other evidence . . . order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties'.

39 According to Art. 34(10), the Registry 'may also rely on the assistance of police in Kosovo, to carry out orders or serve documents on behalf of the Specialist Chambers. The Specialist Chambers officers of the court shall have the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law'.

40 According to Art. 41(12), in addition to detention, the following coactive measures may be ordered by the SC to ensure the presence of the accused during proceedings, to prevent re-offending, or to ensure successful conduct of trial proceedings: summons; order for arrest; and, provided that the accused consents to attend proceedings by video-teleconference, bail with release in Kosovo, house detention in Kosovo, promise not to leave the place of current residence in Kosovo, prohibition on approaching specific places or persons, attendance at police station or other venue in Kosovo, diversion.

41 The compulsory character or the summonses is demonstrated by the rules which apply in case they are disregarded. Pursuant to Art. 42(7)(8), the judges may impose coactive measures — namely, fines and even imprisonment — against those who refuse to appear or to give testimony.

As to the service of prison sentences — an issue which is strictly linked to judicial assistance — Article 57 follows a similar approach. It allows the SC and the Registry to enter into arrangements with states which have expressed their willingness to accept within their territory the service of detention sentences issued by the SC. Should such an arrangement be reached, once the judgment becomes final, the SC may order the transfer of the convict accordingly. The conditions of imprisonment will be governed by the law of the state of enforcement, subject to the SC's supervision (Article 50). Only the SC can alter the duration of the sentence, either through pardon or commutation (Article 51).

7. The Entitlement to Apply International Law: No Bearing on the Domestic Nature of the SC and the SPO

The domestic nature of the SC and the SPO is not called into question by their power to apply customary international law (Article 12). The international nature of any applicable law does not *per se* entail the international nature of a court. It is widely understood that, under certain circumstances, domestic courts may give direct application to international law (compatibly with their Constitutions and with the self-executing character of the international rule to be applied). This does not transform them into international courts. In Kosovo, for instance, the direct applicability and primacy over domestic law of customary international law (and of certain international agreements on human rights) is already prescribed by Articles 19(2) and 22 of the Constitution. Obviously, these provisions bind all judges, prosecutors, institutions and public authorities in the country.

The same reasoning can be applied to Article 3(3), which allows judges — in determining the content and scope of applicable customary norms — to rely on international criminal tribunals' jurisprudence. This link is insufficient to transform the SC into an international tribunal. It does not place them into the purportedly existing international criminal judicial system, but merely enables them to be assisted by such tribunals' practice, possibly because of the latter's extensive and comprehensive nature. This *modus operandi* is typical of any national court. National judicial practice is replete with references to judgments and decisions concerning international crimes and forms of individual responsibility issued by international criminal tribunals.

Some evidence in support of this contention stems from Article 44 of the Law. In determining the punishment to be imposed on a person found guilty of an international crime, the SC are guided by domestic law. In particular, they must take into account the penalties provided for the same crime under Kosovo law applicable at the time of commission, as well as any subsequent more lenient penalty.

8. The Regional Dimension of the SC and the SPO

Notwithstanding their domestic nature, the SC and the SPO have regional dimensions, and are entrenched in regional backgrounds, distinguishing them from purely national judicial bodies. Their establishment satisfies the need to comply with international obligations *vis-à-vis* the EU and recommendations issued by the CoE. As it has been already remarked, these legal bases can be found in Article 1 of the Law (Section 3).

Moreover, the international (European) nature of the institution endowed with the power to appoint judges, prosecutors and personnel (the HCSDP) is a clear manifestation of foreign authority over the SC and the SPO, and a significant component of its regional dimension (Section 4).

Likewise, pursuant to Article 52 of the Law, the status, privileges and immunities granted to the offices and personnel of EULEX under the Law of 20 February 2008 relating to the Status, Immunities and Privileges of Diplomatic and Consular Mission and Personnel in the Republic of Kosovo are extended to the premises, property, documents and personnel of the SC and SPO, as well as to counsels, experts and witnesses.[42] Accordingly, SC and SPO personnel act in Kosovo as if they were foreign personnel entrusted with public functions. This additional link with EULEX, in terms of legal status of their office in Kosovar territory, emphasizes again their regional dimension.

Moreover, according to Article 63 of the Law, the SC and the SPO budget is not provided by Kosovo. Pursuant to Article 61, the SC and the SPO own their archives and maintain them in a dedicated repository outside of Kosovo. Article 62 takes security and privacy concerns into account and demands that documents, papers, records and archives of the SC, the SPO and the Registry are not to be considered public documents of Kosovo.

This international dimension is further demonstrated by the legal personality and powers the SC and the SPO have in their relationship with other states and international organizations for the purposes of fulfilling their mandate (Article 4). In particular, one should consider the SC's treaty-making powers concerning foreign cooperation, judicial assistance (Article 55), privileges and immunities (Article 56) and the service of sentences (Article 57). The prospect of having a seat in a host state also points in the same direction. Article 59 requires an agreement between Kosovo and the host state. These provisions, as a whole, endow the SC and the SPO with an international standing that domestic judicial bodies normally do not enjoy.

42 Art. 52 reads: '[t]he premises, property, funds, assets, archives and records of the Specialist Chambers, the Registry and the Specialist Prosecutor's Office, wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation, public access or any other form of interference whether by executive, administrative, judicial or legislative action. The Specialist Chambers, its principals, judges and staff shall not be subjected by the government or authorities of Kosovo or any other entity or person in Kosovo to any measure or action that may impact the free and independent exercise of their functions under this Law'.

Similar provisions are enshrined in Article 3(6)(7). The SC may enter into special arrangements for testimony or appearances through alternative means at the judges' discretion. The Law also regulates the procedure to be followed for a change of venue.[43]

It seems unlikely that states other than European states might be prone to enter in similar agreements. After all, this would be one of the CoE-recommended forms of judicial assistance that its Member States may take (Section 3). This, again, shows the regional dimension of the SC and the SPO.

9. The Function Exercised by the SC and the SPO within the International Legal Order

The SC and the SPO represent a step forward for the process of 'regionalization' currently underway in the field of international criminal justice. This process was formally inaugurated by the EAC. They were set up to give effect to the international agreement of August 2012 between Senegal and the AU, with the mandate of prosecuting the former Chadian dictator, Hisséne Habre, for international crimes allegedly committed in Chad more than 20 years earlier.[44]

However, unlike the EAC — which is part of the assistance provided by a regional organization (the AU) to one of its Member States (Senegal), in order to prosecute crimes committed by foreigners in another Member State (Chad) — the SC and the SPO are part of the assistance provided by a regional organization (EU) to a non-Member State (Kosovo), in order to prosecute crimes perpetrated in its territory by its nationals. Moreover, the process which led to their establishment was initiated by another regional organization (CoE) of which Kosovo is not a member; the other states most strictly connected to the offences (Albania and Serbia) are also not members of the EU.

The EU's participation seems aimed at creating the factual and legal preconditions for Kosovo's future admission into the EU, namely the restoration and reinforcement of stability and rule of law in Kosovo, with possible positive consequences in the whole region.[45] In this sense, the SC and the SPO may be perceived as a means of ensuring European internal security, given that they

43 For reasons of security or proper administration of justice, the President of the SC, the Specialist Prosecutor, the Specialist Counsel or the Victims' Counsel may invoke a change of venue to the host state of a trial, any part of a trial or any particular stage or stages of the criminal process (Art. 3(8)). Accordingly, the Specialist Prosecutor, the Specialist Counsel, the Victims' Counsel or any other party or person with standing to do so under the Law may file any document and motion at the new seat. In all these cases, the President of the SC is required to issue an administrative decision relocating the proceedings, or any part or phase thereof, to the host state and shall order all necessary steps to give effect to this decision.

44 See, extensively, S. Williams, 'The Extraordinary African Chambers in the Senegalese Courts. An African Solution to an African Problem?', 11 *JICJ* (2013) 1139–1160.

45 On the EU's role as an actor in post-conflict scenarios, see S. Blockmans, J. Wouters and T. Ruys (eds), *The European Union and Peacebuilding* (T.M.C. Asser Press, 2010).

are tasked with prosecuting KLA leaders who are allegedly responsible for heinous crimes.

Moreover, the EU's participation may strengthen Kosovo's claim to statehood, as an effective and independent governmental entity. Such participation seems to be part of an internationally driven state-building process, which aims at the reconstruction and strengthening of governance institutions within a territory torn by armed conflict and civil strife.[46]

In fact, EULEX's role in prosecuting organized and transborder crime in Kosovo has proven inadequate, especially taking into account that those who allegedly bore the greatest responsibility are now senior political leaders.[47]

The above-referenced letter of the President of Kosovo seems to support this line of reasoning. She conceived Kosovo's close cooperation with the EU in setting up the SC and the SPO as a way to 'bring Kosovo closer to full integration in the European Union'. Likewise, in her reply, the EU High Representative for Foreign Affairs added that EULEX, in carrying out its mandate, 'will contribute to facilitating Kosovo's progress towards further integration with the EU'.

Another difference between the EAC and the SC and the SPO lies in the broader international legal context in which the latter came into existence. One should consider, for instance: that the SC and the SPO have been created as a response to the unsuccessful prior efforts (by the ICTY, the UNMIK Regulation 64/2000 Panels and EULEX) to prosecute the offences under their jurisdiction;[48] that Kosovo was placed under international administration after the end of the conflict (UNMIK operated from 1999 until 2008, while the International Steering Group/International Civilian Office from 2008 until 2012); and that various international entities were involved in the determination of Kosovo's final status (the UN, the International Court of Justice and the CoE).

In this regard, one should notice that the pursuit of criminal justice in Kosovo has been increasingly 'regionalized' over the years. At the beginning, the UN exercised criminal jurisdiction through UNMIK, which, in 2000

46 On this process, its origins, contents and implications, see E. Milano, *Formazione dello Stato e processi di State-building nel diritto internazionale. Kosovo 1999-2013* (Editoriale scientifica, 2013).

47 See A.L. Capussela, *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans* (I. B. Tauris, 2015).

48 The CoE Report followed the 'revelations of the former Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY), who alleged that serious crimes had been committed during the conflict in Kosovo' (*supra* note 6, § 1) by KLA militia leaders against Serbians and Albanian Kosovars, including imprisonment in secret detention centres, inhuman and degrading treatment, forced disappearance (§§ 3, 5). The Report stressed that 'the international authorities in charge of the region did not consider it necessary to conduct a detailed examination of these circumstances, or did so incompletely and superficially' (§ 6). In particular, the 'ICTY, which had started to conduct an initial examination on the spot to establish the existence of traces of possible organ trafficking, dropped the investigation' (§ 8). After the conflict ended, the 'international organisations in place in Kosovo [i.e., UNMIK] favoured a pragmatic political approach, taking the view that they needed to promote short-term stability at any price' (§ 10). As a result, 'EULEX . . . inherited a difficult and sensitive situation, particularly in the sphere of combating serious crime . . . . Consequently, a large number of crimes may well continue to go unpunished' (§ 11).

established mixed panels and teams composed of a majority of foreign judges and prosecutors to deal with serious offences in compliance with due process rights (UNMIK Regulation 64/2000 Panels). After the February 2008 declaration of independence, the EU replaced the UN as international civil presence in Kosovo. The EU Council dispatched EULEX, a civilian mission under the EU Common Security and Defence Policy aimed at monitoring, advising and providing technical assistance to local authorities and law enforcement agencies in the rule of law area (police, justice and customs), including with regard to the prosecution of international and transborder crimes connected to the conflict.[49]

At the end of 2008, UNMIK began deferring cases to EULEX. One of EULEX's essential objectives was to develop an independent and impartial multi-ethnic justice system, able to conduct fair trials according to European best practices. Foreign judges and prosecutors were assigned to criminal cases by EULEX. These judges and prosecutors sat, together with their local counterparts, on mixed panels and boards, to guarantee that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes were properly investigated, prosecuted and adjudicated.[50] Since Kosovo's independence, cases have been tried before panels led by an EULEX judge and composed of other EULEX and local judges.[51] They have received from UNMIK hundreds of cases, at various stages of the proceedings. EULEX identified as a priority the prosecution of war crimes perpetrated during the 1998–1999 conflict.

The SC and the SPO fit in this process of 'regionalization' driven by the EU and are closely connected, in terms of staff management, with EULEX. The question thus arises whether they might have the same outcome and, in such an event, how to avoid it. However, development of this point is beyond the scope of this inquiry.[52] From a normative perspective, the circumstances under which a judicial body actually achieves — or does not achieve — the purpose for which it was created seems to have no bearing on its legal categorization.

49 For an insight, see S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing, 2012), at 88–90.

50 Art. 3(d) Council Joint Action 2008/124/CFSP of 4 February 2008, on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *Official Journal of the European Union*, L 42/92, 16 February 2008.

51 Law No. 03/L-053 of 13 March 2008, on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (available online at www.kuvendikosoves.org, last visited 3 November 2015); Law No. 03/L-052 of 13 March 2008, on the Special Prosecution Office of the Republic of Kosovo (available online at www.kuvendikosoves.org, last visited 3 November 2015).

52 For a thorough analysis of EULEX rule of law-reforming task and its consequences for maintaining peace and security in Kosovo, see T. Altwicker and N. Wieczorek, 'Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX', *Journal of Conflict and Security Law* (2015) 1–19 (available on line at www.jcsl.oxfordjournals.org, last visited 25 November 2015).

10. Concluding Observations: A 'Regional' Mixed Criminal Tribunal?

The SC and the SPO constitute a special temporary institution. Their establishment was inspired by the experience gained during the last two decades in some countries, which like Kosovo were recovering from serious crises. Unlike in those countries, however, the UN did not participate in the creation and functioning of these judicial bodies; rather, the EU, a regional organization, did, as a measure of (late) state-building, and as a way to foster Kosovo's progressive approach to EU membership. Kosovo housed the conflict in (and following) which the offences were perpetrated. In light of their internal features and mandate, the SC and the SPO have the potential to positively influence national reconciliation and state-building processes. They might entail long-term effects in Kosovo, at the normative and institutional levels. Their national origins bring them close to the society massacred by the crimes, imparting a sense of local ownership to criminal proceedings for the atrocities committed during the war in Kosovo.

Hence, from a functional perspective, the SC and the SPO resemble a mixed criminal tribunal. The creation of new mixed tribunals is a feasible and useful contribution to the reconstruction of judicial systems within countries which have been torn by international crimes and other mass atrocities.[53] One should not rule out the possibility that such contribution might be undertaken or promoted by a regional organization, rather than by the UN. Therefore, should one be willing to categorize them, the SC and the SPO — given their regional background — could be considered as institutional variations on the theme of mixed criminal tribunals. They are not linked to 'classic' UN post-conflict peacebuilding, but rather to EU state-building activities. In this sense, they seem to be the first example of what perhaps might be called a 'regional' mixed criminal tribunal.

53 On this point see Romano, *supra* note 19, at 75.